

Constitutionality of Financial Disclosure Laws

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NOTE

THE CONSTITUTIONALITY OF FINANCIAL DISCLOSURE LAWS

The First Amendment creates a sanctuary around the citizen's beliefs. His ideas, his conscience, his convictions are his own concern, not the government's.¹

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.²

These observations of Justices William O. Douglas and Louis Brandeis reveal the tension in our legal and political systems between an individual's right of privacy and the public's right to know.³ The right of an individual to maintain the privacy of his beliefs and associations frequently conflicts with the right of society to make some inquiry into the backgrounds of its citizens.⁴ This conflict is highlighted by recently enacted federal and state campaign disclosure laws directing candidates to reveal the source and amount of their campaign contributions, and conflict-of-interest laws, forcing public officials to disclose the nature and extent of their personal investments.⁵ Although disclosure laws might pose significant potential hazards to basic rights of privacy, expression,

¹ W. DOUGLAS, *POINTS OF REBELLION* 3 (1970).

² Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10.

³ Implicit in the first amendment's guarantees of free expression is a recognition of the importance in any democratic system of an informed public. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. The right of the public to be informed on the general issues of the day has thus appeared as a primary rationale of several Supreme Court decisions upholding first amendment freedoms of the press, and in at least one such decision the public's right to know has been explicitly deemed to be a constitutional requirement. A consideration of such cases, and of the underlying philosophy of the first amendment which they reveal, compels the conclusion that the right of the public to receive information concerning significant political and social issues should now be regarded as a fundamental American constitutional concept. For a discussion of the public right to know and its constitutional implications, see Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971) [hereinafter cited as Redish]; notes 50-65 and accompanying text *infra*.

⁴ See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁵ For a summary of the latest federal and state financial disclosure laws, see notes 22-37 and accompanying text *infra*.

and association, a compelling state interest in preventing official corruption justifies the risk which such legislation entails.

I

THE NEED FOR FINANCIAL DISCLOSURE LAWS

The ever-present concern that political offices may be used improperly for personal gain and an awareness of the steeply rising costs incurred by political campaigns have led to the recent enactment of more stringent financial disclosure laws.⁶ Such legislation falls into two general categories: (1) conflict-of-interest laws, which require public officials to reveal their private investments,⁷ and (2) campaign disclosure laws, which direct candidates to disclose the source and amount of political contributions.⁸ Recently, public suspicion has been aroused over high elected officials' alleged pursuit of personal financial gain while in office.⁹ Such suspicions point up the need for conflict-of-interest laws that inhibit secret financial dealings by public officials. Such laws can help to dispel a widespread public belief that self-dealing often prevails over statesmanship in the highest offices of the land.¹⁰

Similarly, the need for comprehensive campaign disclosure legislation is revealed by the upward spiraling cost of election campaigns.¹¹ In the 1972 election, for example, campaign expendi-

⁶ See COMMITTEE FOR ECONOMIC DEVELOPMENT, FINANCING A BETTER ELECTION SYSTEM 11, 16 (1968).

⁷ See notes 32-34 *infra*.

⁸ See notes 19-31 *infra*.

⁹ In August 1973, the potential for conflicts of interest in government service was illustrated by dramatic reports that a Maryland grand jury was investigating former Vice President Agnew for his possible receipt of illegal "kickbacks" from contractors during his tenure as Governor of Maryland. See N.Y. Times, Aug. 8, 1973, § 1, at 1, col. 8. Allegations that Mr. Agnew and his associates may have concealed their personal use of such funds raised doubts about the integrity of state officials in general and of Mr. Agnew in particular—doubts that may have never arisen if the former Vice President's personal transactions had been required to be reported by a comprehensive state conflict-of-interest law.

¹⁰ Such fears, whether or not justified, exert an unhealthy effect upon our political process. A 1967 Harris poll reported that 60% of those interviewed believed that most politicians were susceptible to bribes and generally served special rather than public interests. See P. KIMBALL, BOBBY KENNEDY AND THE NEW POLITICS 178-79 (1968). And in May 1973, George Gallup found that while 50% of the people polled believed that the President had participated in the coverup of the Watergate burglary, 58% believed there to be little difference between the corruption of the Nixon Administration and that of its predecessors. See N.Y. Times, May 6, 1973, § 4, at 17, col. 8.

¹¹ Spiraling campaign costs are perhaps most dramatically revealed by comparing the

tures increased dramatically, and candidates' reliance upon the generosity of a few important campaign contributors was greater than ever before.¹² Indeed, it was the pressing need for funds to meet the high costs of the 1972 elections that prompted the aggressive fund raising efforts on behalf of the Republican national ticket which, in turn, raised the spectre of impropriety in decisions by the Department of Justice,¹³ the Securities and Exchange

total campaign spending in each of the five preceding presidential election years for *all* federal and state offices. In 1952, that total was \$140 million; in 1956, \$155 million; in 1960, \$175 million; in 1964, \$200 million; and in 1968, \$300 million—an increase of 50% over the 1964 total. H. PENNIMAN & R. WINTER, JR., *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* 8 (1971)[hereinafter cited as PENNIMAN & WINTER]. In the mid-1960's it was estimated that in an average-sized state a competitive Senate race would cost a candidate between \$300,000 and \$800,000, while a hotly contested campaign for the House of Representatives would cost each candidate up to \$100,000. F. SORAUF, *PARTY POLITICS IN AMERICA* 312 (1972). Such escalating costs are not simply the products of inflationary pressures or increases in population. See R. MACNEIL, *THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS* 228 (1968); TWENTIETH CENTURY FUND COMM'N *CAMPAIGN COSTS IN THE ELECTRONIC ERA, REPORT: VOTERS' TIME* 10, 11 (1969).

With the costs of campaigning rising so dramatically, most candidates have been forced to rely more heavily upon wealthy contributors to support their drives for political office. Not only does this reliance demean those in public life and deter many who do not wish to engage in fund-raising from seeking public office, but it also increases the possibility that elected officials will grant special favors to big contributors whose continued generosity is so critical to their hopes for reelection. Indeed, statistics reveal that, for the most part, candidates have relied on a few wealthy contributors, rather than the public-at-large, to absorb the higher costs of campaigning. It is not unusual for 100 or more individuals to contribute at least \$10,000 to the campaign chests of one of the major parties in an election year. See H. ALEXANDER, *FINANCING THE 1964 ELECTION* 86, 128-31 (1966). In most election campaigns 60% to 75% of the expenses are paid for by persons contributing \$500 or more. PENNIMAN & WINTER 20.

With such sharply rising campaign costs and continued candidate reliance upon a few large contributors, it appears more important now than ever before to insure that effective disclosure laws discourage the offering or receiving of contributions in the expectation of future political favors.

¹² Total spending at all levels for the 1972 elections was estimated to have totaled nearly \$400 million, up \$100 million from the record total expenses of the 1968 election. See *N.Y. Times*, Nov. 19, 1972, § I, at 1, col. 1; note 11 *supra*. The importance of the large contributors in the financing of such expensive campaigns can be seen in the scrambling of candidates Nixon and McGovern in 1972 for the support of wealthy backers. The Finance Committee to Re-Elect the President managed to collect over \$35 million for its campaign chest, with a large boost to the total coming from more wealthy contributors. See *N.Y. Times*, Feb. 1, 1973, § 1, at 8, col. 1. Senator Tower's (R. Texas) 1972 campaign for reelection, the most expensive of all Senate races, provides another example of how crucial the support of the large contributors is to a candidate today. The Senator's campaign chest totaled \$2.5 million. However, his opponent, Barefoot Saunders, unable to attract the more wealthy contributors, was only able to raise one quarter of that sum in his unsuccessful attempt to unseat Senator Tower. See *id.*, Nov. 19, 1972, § 1, at 1, col. 1.

¹³ The furor over the "ITT affair" highlights the potential for actual and apparent conflicts of interest on the part of government officials. In 1969, the Justice Department filed three antitrust suits against the International Telephone and Telegraph Corporation, but in

Commission,¹⁴ and the Committee for the Re-Election of the President.¹⁵ If such high costs, and the inducements to impropriety they spawn, become a permanent characteristic of the American political system,¹⁶ campaign disclosure laws can have a significant

1971, a settlement between the parties allowed ITT to acquire the Hartford Fire Insurance Company, thereby accomplishing the largest corporate merger in this country's history. Subsequent disclosures of ITT's \$400,000 contribution to the Republican Party created suspicions of undue favoritism in the settlement of the antitrust action. *See id.*, Aug. 3, 1973, § 1, at I, col. 1; Note, *Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?*, 23 CASE W. RES. L. REV. 631, 637 n.25 (1972).

More candid disclosure of this type of contribution might have prevented any conflicts of interest in the settlement of the government's case; it might also have precluded any unfounded suspicions of official impropriety.

¹⁴ In May 1973, former Attorney General John Mitchell, former Secretary of Commerce Maurice Stans, and New Jersey financier Robert Vesco were indicted for conspiring to defraud the United States and to obstruct justice. The charges stemmed from a secret contribution of \$200,000 in cash made by Mr. Vesco to the Finance Committee to Re-Elect the President, allegedly in return for a promise by Mr. Stans and Mr. Mitchell to influence an investigation of Mr. Vesco then being conducted by the Securities and Exchange Commission. *See* N.Y. Times, May 11, 1973, § 1, at I, col. 8.

¹⁵ The large amounts of money secretly held by the Committee to Re-Elect the President seemed to make dubious campaign tactics less resistible to the members of that committee. Faced with readily available cash, neither the source nor expenditure of which had to be reported, the committee apparently felt capable of engaging in such campaign tactics as secretly financing a New York Times advertisement claiming that "the people" supported the President's mining of Haiphong Harbor, organizing congratulatory telegrams from various veterans' groups concerning the mining of that harbor, and paying a college student \$150 a week to disrupt and spy on antiwar picketers in front of the White House. *See id.*, April 29, 1973, § 4, at I, col. 8.

¹⁶ Campaign Communications Reform Act, 47 U.S.C.A. §§ 312, 315, 801-05 (Supp. 1973). The new law limits purchases of space or time on all communications media by or on behalf of a candidate for federal elective office to the larger of ten cents times the voting age population of the election area, or \$50,000. The total allocable "for the use of broadcast stations" is limited to 60% of that sum. Primaries and primary run-offs are subject to the same limitations, and are treated separately from each other and from the general election. A candidate for the presidential nomination is subject to these limitations on a state-by-state basis, as if he were running for the office of Senator in each state. The ceilings fluctuate upward with the Consumer Price Index. *Id.* § 803. Willful and knowing violation of these provisions subjects the offender to a maximum fine of \$5,000 or a maximum five-years' imprisonment or both. *Id.* § 805.

On July 30, 1973, the Senate passed the Federal Election Campaign Act Amendments of 1973. S. 372, 93d Cong., 1st Sess. (1973). The bill repeals the Campaign Communications Reform Act, amends the Communications Act of 1934 (47 U.S.C. §§ 151-609 (1970)) with respect to the equal time provision of § 315, amends Titles III and IV of the Federal Election Campaign Act of 1971 (2 U.S.C.A. §§ 431-41, 451-54 (Supp. 1973)), and creates a Federal Elections Commission. The bill differentiates between primary election and general election expenses and limits campaign expenditures by a per-voter or absolute maximum schedule, but unlike the Campaign Communications Reform Act it is to replace, these limitations pertain to all campaign expenditures. Individual contributions are limited to \$3,000 per candidate with a maximum on all political contributions of \$25,000. As Congress reconvened in the fall of 1973, it appeared that the Senate's campaign reform amendments would face tough going in the House. *See* 31 CONG. Q. 2152 (August 4, 1973).

impact in insuring official integrity and effective democratic participation in the political process.

II

FEDERAL AND STATE FINANCIAL DISCLOSURE LAWS

Federal and state laws now provide for the disclosure of the amount and source of campaign contributions to candidates for public office.¹⁷ Since April 1972, financial disclosure requirements for candidates seeking federal office have been mandated by the Federal Election Campaign Act of 1971.¹⁸ Title III of the Act¹⁹

¹⁷ See notes 19-34 and accompanying text *infra*.

¹⁸ Act of Feb. 7, 1972, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18 & 47 U.S.C.A. (Supp. 1973)). This new legislation repealed the earlier, generally ineffective disclosure provisions of the Federal Corrupt Practices Act and the Election and Political Activities Laws. 2 U.S.C. §§ 241-56 (1970); 18 U.S.C. §§ 591-612 (1970).

The Election and Political Activities Laws prohibited campaign contributions exceeding \$5,000 per year (18 U.S.C. § 608 (1970)), the receipt by political committees of more than \$3 million in a year (*id.* § 609), and contributions by national banks, corporations, and labor unions to federal election campaigns. *Id.* § 610.

The Federal Corrupt Practices Act directed every political campaign committee to account for all its receipts and expenditures (2 U.S.C. § 242 (1970)), to report such statistics to a clerk of one of the Houses of Congress within thirty days after an election (*id.* § 248), and to refrain from promises of appointment or influence as an inducement for financial support. *Id.* § 249.

Enforcement of these early disclosure laws was quite ineffective. The unrealistic three million dollar limit on the receipts of campaign committees was avoided by the formation of a "plethora of independent committees" which did not conform to the strict definition of "committee" in the Election and Political Activities Laws. See 18 U.S.C. § 591 (1970); Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259, 1265-66 (1953). Also working against any effective enforcement of the old disclosure laws were the non-application of expenditure ceilings to primaries (2 U.S.C. § 246 (1970)), the exemption from reporting requirements of contributions received by political committees without a candidate's knowledge (*id.*), the absence of any prescribed form for a candidate's financial statements (*id.*), and the complete discretion given to congressional clerks on reporting campaign spending violations. *Id.* §§ 244-45.

For a discussion of some of these shortcomings of the earlier federal campaign disclosure laws, see Note, *supra* note 13, at 640-46; Note, *Regulation of Groups Tending To Influence Public Opinion*, 48 COLUM. L. REV. 589, 598 (1948). See also Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 42 (1966).

¹⁹ 2 U.S.C.A. §§ 431-41 (Supp. 1973). Title I (47 U.S.C.A. §§ 312, 315, 801-05 (Supp. 1973)) establishes a ceiling on the total amount of expenditures that a candidate may make during the course of a campaign and requires radio and television stations to allow reduced broadcast rates to legally qualified candidates. The effectiveness with which this expenditure ceiling will be enforced will depend, in turn, upon the effectiveness with which the financial disclosure provisions of Title III can be enforced. See notes 20-23 *infra*.

Title II amends the Election and Political Activities Laws (18 U.S.C. §§ 591, 600, 608, 610-11 (1970)), by repealing unrealistic limitations on individual campaign contributions and by redefining "political committees" subject to disclosure in a broader and more inclusive manner. These new provisions should make the enforcement of campaign activities laws more effective.

calls for periodic pre-election disclosures of all significant receipts and expenditures made by or on behalf of a candidate for federal office.²⁰ Provisions are included for the reporting of the names and addresses of those who contribute more than one hundred dollars to a campaign.²¹ All reports are to be made available for sale to the public on a broad basis.²² Adherence to such reporting requirements is to be insured by the carefully drawn enforcement provisions of the Act.²³ By requiring detailed reports, providing for broad publicity, and guaranteeing tight enforcement machinery, the Federal Election Campaign Act of 1971 should provide more effective financial disclosure than earlier federal campaign laws.²⁴

Almost every state compels some disclosure of election finances.²⁵ These state disclosure laws, however, vary widely in both breadth and effectiveness. A few states, possibly inspired by the early example of Florida,²⁶ have enacted detailed publicity and enforcement provisions much like those later adopted by the Federal Election Campaign Act.²⁷ Other less comprehensive state

²⁰ 2 U.S.C.A. § 434 (Supp. 1973). Reports of contributions are to be filed on the tenth day of March, June, and September of each year, and on the fifteenth and fifth days before any election.

Committees required to submit financial reports are defined to include any organization working on behalf of a candidate and accepting contributions or making expenditures in excess of \$1,000.

²¹ *Id.* § 434(b)(2).

²² *Id.* § 432(f)(2)(B).

²³ The officer with whom financial reports are filed is required to report any "apparent violations" to the Justice Department. *Id.* § 438(a)(12). The Attorney General is directed to institute civil actions if a hearing shows that any person has violated, or is about to violate, any provisions of the Federal Election Campaign Act. *Id.* § 438(d).

²⁴ The potential effectiveness of the new disclosure provisions of the Federal Election Campaign Act is revealed by the frantic manner in which political contributions were sought in the days preceding April 7, 1972—the effective date of the new Act. Entirely aware that contributions made before that date would be subject only to the rather weak disclosure provisions of the Corrupt Practices Act, Maurice Stans, President Nixon's chief fund-raiser for the 1972 campaign, spent the early spring of 1972 in a feverish round of meetings with wealthy supporters of the President. One of Mr. Stans's big "selling points" in his conversations with those contributors was the argument that only if the contributors acted before the effective date of the Federal Election Campaign Act, could they successfully keep their donations hidden from public view. *See* N.Y. Times, March 26, 1972, § 1, at 1, col. 1.

²⁵ North Dakota and Rhode Island have not followed the rest of the country in requiring candidates to file some report of their electoral expenses and receipts.

²⁶ The Florida statute (FLA. STAT. ANN. § 99.161 (1960)) contains elaborate reporting, publicity, and enforcement provisions. For a general discussion of the statute and its ramifications, see Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434 (1962).

²⁷ The following state laws, for example, require disclosure of the names and addresses of all significant campaign contributors, the submission of public disclosure reports before and after primary and general elections, and penalties for violations of campaign laws

campaign laws contain no requirements for making public the names and addresses of contributors,²⁸ allow candidates to wait until after an election to submit financial statements,²⁹ or detail only minimal standards for the violation of which a candidate may be prosecuted.³⁰

Closely analogous to these campaign disclosure statutes are federal and state conflict-of-interest laws.³¹ Some conflict-of-interest legislation merely prohibits public officers from dealing in an official capacity with associations in which they have a financial interest.³² Other laws, in addition to proscribing unethical activities, provide for the periodic submission of financial statements by legislators³³ and other public officials.³⁴

revealed by the periodic financial statements: KAN. STAT. ANN. §§ 25-901 to -905 (Supp. 1972); MICH. STAT. ANN. §§ 6.1906-1907 (1972); MINN. STAT. ANN. § 211.20 (Supp. 1973); N.H. REV. STAT. ANN. §§ 70:4-6 (1970); ORE. REV. STAT. §§ 260.055-162 (1971); VT. STAT. ANN. tit. 17, §§ 2051-56 (Supp. 1972); W. VA. CODE ANN. §§ 3-8-5, 3-8-7, 3-8-10 (1971); WIS. STAT. ANN. § 12.09 (Supp. 1973).

Each of the above statutes also places an absolute limit upon a candidate's electoral expenditures.

²⁸ The following state statutes require no specific indication of the sources from which a candidate secured his contributions: MONT. REV. CODES ANN. § 23-4730 (Supp. 1973); S.C. CODE ANN. § 23-265 (Supp. 1971); TENN. CODE ANN. § 2-2101 (1971); WASH. REV. CODE ANN. § 42.21.060 (1972).

²⁹ The following state statutes do not require candidates to submit any financial disclosure reports until a designated number of days after an election: MO. REV. STAT. § 129.100 (1969); OHIO REV. CODE ANN. §§ 3517.08, 3517.10 (Page 1972); S.D. COMPILED LAWS ANN. §§ 12-25-7, 12-25-17 (1967).

³⁰ The following states, for example, place no ceiling on a candidate's total election expenses: CONN. GEN. STAT. ANN. §§ 9-333 to -348 (Supp. 1973); ME. REV. STAT. ANN. tit. 21, §§ 1397-99 (1965); MASS. GEN. LAWS ANN. ch. 55, §§ 1-26 (1961); MISS. CODE ANN. § 23-3-4 (1972); NEB. REV. STAT. § 32-1101 to -1133 (1968); N.J. REV. STAT. § 19:39-2 (1967); N.C. GEN. STAT. §§ 163-261 (1972); OKLA. STAT. ANN. tit. 26, § 423.3 (1970); PA. STAT. ANN. tit. 25, §§ 3221-34 (Supp. 1973-74); VA. CODE ANN. §§ 24.1-25.7 (1973).

These states do, however, make it a criminal offense to engage in certain corrupt or coercive activity during a campaign or to fail to meet the disclosure requirements of their election laws.

³¹ See notes 33-34 and accompanying text *infra*.

³² Most state conflict-of-interest statutes are of this general prohibitive variety, with no real provisions for monitoring the financial favoritism they proscribe and no effective methods for punishing impropriety in the financial dealings of public officials. See, e.g., OKLA. STAT. ANN. tit. 74, §§ 1401-16 (Supp. 1972-73). Other state statutes in this area merely rely on public officials to voluntarily disclose their financial interests before engaging in state business involving a business enterprise with which they have a financial relationship. See, e.g., MD. ANN. CODE art. 19A, § 3 (1973); MASS. GEN. LAWS ANN. ch. 268A, §§ 7, 13 (1968).

³³ See, e.g., MO. REV. STAT. § 105.460 (1966); N.J. REV. STAT. § 52:13d (Supp. 1973-74) (legislators required to file statements of personal interests in legislation pending before legislative body of which a member); PA. STAT. ANN. tit. 46, § 143.5(d) (1956) (legislator cannot receive any compensation in transaction involving state agency before filing statement of personal interest in transaction).

³⁴ The following state statutes provide for annual reports by state legislators, officials,

III

ATTACKS ON THE CONSTITUTIONALITY OF DISCLOSURE LAWS

Although both types of disclosure laws have been subjected to a variety of constitutional criticisms,³⁵ campaign disclosure laws have survived the most stringent scrutiny. Some commentators have argued that campaign disclosure laws might inhibit a contributor's right of association, a candidate's rights of free expression, and the public's right to be informed about potential holders of public office.³⁶ It has also been suggested that forced campaign disclosure is inimical to our concepts of privacy and that if the revelation of contributors can be compelled, constitutional blessings may soon be bestowed upon intrusions into other aspects of an individual's personal political beliefs.³⁷

Case law similarly raises constitutional doubts over the effect of campaign disclosure laws upon candidates' rights of free

and employees of their financial interests in businesses subject to state regulation: HAWAII REV. STAT. § 84-17 (Supp. 1972); ILL. ANN. STAT. ch. 127, § 604A-101 (Smith-Hurd Supp. 1973-74); N.M. STAT. ANN. § 5-12-10 (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 6252-9 (Cum. Supp. 1972-73); UTAH CODE ANN. § 67-16-7 (Supp. 1973).

Federal conflict-of-interest provisions are found in special legislation and in an executive order designed to further the objectives of that legislation. The federal conflict-of-interest law (18 U.S.C. §§ 201-24 (1970)) provides for the fining or imprisonment of public officers or government employees who deal in their official capacities with organizations in which they have a financial interest. *Id.* § 208(a). Only if a government official or employee has made a full disclosure of his interests in such organizations can he avoid such penalties. *Id.* § 208(b).

Executive Order No. 11,222 (3 C.F.R. 306 (1964-65 comp.)), 18 U.S.C. § 201 (1970) attempts to further discourage favoritism by government employees toward associations in which they have a personal interest. Under that order, "special" government employees must supply to the Civil Service Commission lists of organizations to which they belong; such employees may be required to submit additional financial information at the Commission's discretion. *Id.* § 306. The Civil Service Commission is given authority to require other federal employees to file financial statements (*id.* § 402), the contents of which shall be reported to the President and to agency heads when indicative of a conflict of interests. *Id.* § 404.

³⁵ See notes 36-43 and accompanying text *infra*.

³⁶ See, e.g., Redish, 925-32. Redish argues that the public's right to know, as well as contributors' rights of free expression and association, are rights within the sweep of the first amendment and are each infringed by disclosure laws. See note 85 and accompanying text *infra*.

³⁷ See PENNIMAN & WINTER 64. Professor Winter argues that if the government can constitutionally require registration of campaign contributors, it cannot be prevented from requiring disclosure in other campaign areas, such as the names of those who write certain types of opinion letters to congressmen. But Winter overlooks the special public interest supporting disclosure laws directed specifically at campaign contributors as well as the merely incidental infringement of first amendment rights that allows narrowly drawn campaign disclosure laws to survive constitutional attack. See notes 112-18 & 137-45 and accompanying text *infra*.

expression.³⁸ Despite earlier judicial validation of campaign disclosure laws,³⁹ a lingering constitutional pall hangs over such legislation. The latest decision finding financial disclosure laws constitutional was handed down in 1934, before rights of privacy and association had received their modern recognition.⁴⁰ In the latest case construing the constitutionality of the new Federal Election Campaign Act,⁴¹ the court acknowledged that earlier decisions did not preclude reconsideration, in an appropriate factual context, of the legitimacy of disclosure laws' effects upon rights of privacy and association.⁴²

The recent case of *Pichler v. Jennings*⁴³ reveals that constitutional criticism of campaign disclosure laws is more than academic. In *Pichler*, the Conservative Party of New York asserted that the financial disclosure provisions of the Federal Election Campaign Act of 1971⁴⁴ unconstitutionally abridged its members' freedom of privacy and association. The court dismissed the complaint for failure to allege any specific deprivations of first amendment rights suffered by Conservative Party members,⁴⁵ but in so doing the

³⁸ See *Shelton v. Tucker*, 364 U.S. 479 (1960); notes 107-08 and accompanying text *infra*.

³⁹ See notes 86-93 and accompanying text *infra*.

⁴⁰ *Cf. Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

Two cases now pending in District of Columbia District Court may force a judicial resolution of the question of the constitutionality of campaign disclosure laws. Common Cause, the plaintiff in each case, has filed suit in Common Cause v. Jennings, Civ. Doc. No. 2379-72 (D.D.C. filed Nov. 30, 1972), for an injunction and a declaratory judgment to force the clerks of each House of Congress to act upon various complaints of violations of the Federal Election Campaign Act of 1971. In Common Cause v. Finance Comm. to Re-Elect the President, Civ. Doc. No. 1780-72 (D.D.C. filed Sept. 6, 1972), the Corrupt Practices Act is serving as the basis for a suit by Common Cause to compel the disclosure of the names and addresses of Republican contributors whose donations to the party were made before the new Federal Election Campaign Act went into effect on April 7, 1972. An out-of-court agreement between the parties to this case resulted in the disclosure of such information by the Committee on September 28, 1973. Although the case is still legally pending before the district court, this settlement will probably prevent the case from going to trial.

⁴¹ *Pichler v. Jennings*, 347 F. Supp. 1061 (S.D.N.Y. 1972).

⁴² *Id.* at 1069.

⁴³ *Id.* at 1061.

⁴⁴ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18 & 47 U.S.C.A. (Supp. 1973)).

⁴⁵ Particularly disturbing to the court was the fact that, although a line of Supreme Court cases suggested that the Conservative Party members' rights of association would be infringed if they feared community reprisals as a consequence of their disclosed political affiliation, no allegation was made in the Party's complaint that any such reprisals had occurred or were likely to occur. In the absence of such allegations, the court felt it lacked the clear factual controversy that would have allowed it to balance the state's interest in disclosure against the Party's interest in privacy. As a consequence, the court could make no decision concerning the ultimate constitutionality of the Federal Election Campaign Act. 347 F. Supp. at 1069.

court emphasized that a more appropriate factual situation might pose a thorny constitutional question—to what extent can the state's interest in disclosure override the individual's interest in preserving the privacy of his associations?⁴⁶

Recent state supreme court cases raise similar constitutional questions concerning conflict-of-interest statutes. In *Carmel-by-the-Sea v. Young*,⁴⁷ for example, the California Supreme Court declared that state's conflict-of-interest law⁴⁸ unconstitutional. Forcing public officials to disclose all investments exceeding \$10,000, the court said, constituted an unwarranted invasion of privacy. In *Stein v. Howlett*,⁴⁹ however, the Illinois Supreme Court passed favorably upon that state's conflict-of-interest statute.⁵⁰ The court found that the importance of providing the public with a full disclosure of officials' financial backgrounds outweighed any incidental infringements of those officials' rights of privacy.⁵¹

The vital difference between these two cases is that the Illinois court recognized the public's right to know. This right is the crucial determinant in deciding the constitutionality of financial disclosure laws. Supported by the public's right to know, both campaign disclosure and conflict-of-interest laws can justify reasonable encroachments upon rights of privacy, expression, and association.

IV

THE PUBLIC INTEREST SUPPORTING DISCLOSURE LAWS

Financial disclosure laws are justified by the overriding public interest in discouraging corruption, fostering confidence in public officials, and maintaining an educated electorate.⁵² Disclosure laws further such interests by helping an informed electorate guard against potentially abusive uses of wealth by candidates and public

⁴⁶ The court stated that any question of the Act's constitutionality would remain open until demonstrated that, because of the Act's disclosure requirements, citizens fearful of community censure had been deterred from political involvement. *Id.*

⁴⁷ 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

⁴⁸ CAL. GOV'T CODE §§ 3600-3704 (West Supp. 1973).

⁴⁹ *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

⁵⁰ ILL. ANN. STAT. ch. 127, § 604A-101 (Smith-Hurd Supp. 1973).

⁵¹ The Act's broad requirement that *all* of an official's investments be disclosed, regardless of their relationship to his official duties, did not appear impermissible to the court. The Illinois court was able to sustain the same type of compelled disclosure invalidated by the California court largely because of its emphasis upon the need of the public to be informed about the backgrounds of its leaders—a need which the court deemed sufficient to justify any incidental infringement of the right of privacy.

⁵² See notes 6-18 and accompanying text *supra*; notes 68-74 and accompanying text *infra*.

officials. Thus, as a means of guarding the integrity of the democratic process, disclosure laws help to create an important democratic tool—a citizenry informed of its leaders' financial backgrounds and therefore capable of guarding against potentially abusive uses of wealth by candidates and public officials.⁵³

Among recent first amendment cases, *Red Lion Broadcasting Co. v. FCC*⁵⁴ most explicitly places the public right to know upon a constitutional plane. Under challenge in that case was the Federal Communications Commission's "fairness doctrine," under which radio and television broadcasters are required to provide time for the airing of competing points of view on questions of significant public interest and for personal responses by individuals accused of undesirable conduct in broadcast editorials.⁵⁵ In rejecting the broadcasters' argument that the fairness doctrine inhibited their first amendment right to freely disseminate any viewpoints they chose, the Court posited a more important competing right of the public to be fully informed on public issues: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged . . ."⁵⁶ Indeed, in *Red Lion* the Court subsumed the public right to know under the same first amendment protection invoked by the broadcasters in their challenge to the fairness doctrine.⁵⁷

Other constitutional decisions, although not so explicitly definitive of the public right to know, have justified the protection of first amendment rights in terms of the need to maintain an informed citizenry. For example, in *New York Times Co. v. Sullivan*,⁵⁸ the need to encourage the freest possible dissemination of information through the press helped provide the Court with a rationale for its decision to allow only proof of "actual malice" to form the basis of a libel action by a public official against a newspaper. In explaining the first amendment policies that lay at the root of its decision, the Court stated:

⁵³ For a characterization of such disclosure laws as legislation designed to "purify" the democratic system, see T. EMERSON, A SYSTEM OF FREEDOM OF EXPRESSION 634 (1970); see notes 54-69 and accompanying text *infra*.

⁵⁴ 395 U.S. 367 (1969).

⁵⁵ *Id.* at 369, 373-75.

⁵⁶ *Id.* at 390.

⁵⁷ [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*

Id. at 390 (emphasis added).

⁵⁸ 376 U.S. 254 (1964).

The constitutional safeguard . . . "was fashioned to assure unfettered interchange of ideas. . . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."⁵⁹

The subsequent extension of the *Times*' "actual malice" standard to candidates,⁶⁰ "public figures,"⁶¹ and even individuals involved merely in events of public interest⁶² illustrates how jealously the Court has guarded methods of expression that help maintain an informed public.

Other cases involving the press' function in the American democratic system emphasize that the public right to know is best guaranteed by diversity of expression. For example, in *Mills v. Alabama*,⁶³ the Court invalidated an Alabama law making it a crime for a newspaper to publish editorials on election day urging voters to support a particular candidate. Important in the Court's decision was its recognition of the press as a critic of the *status quo* and as a traditionally important means of "keeping officials . . . responsible to all the people whom they were selected to serve."⁶⁴ In *Associated Press v. United States*,⁶⁵ the Court upheld an antitrust judgment against the Associated Press on the theory that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁶⁶

⁵⁹ *Id.* at 269 (citations omitted).

⁶⁰ *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). In *Monitor*, the Court indicated that proof of "actual malice" would be a prerequisite to a successful libel action founded upon nearly any statements made about a candidate for public office: "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." *Id.* at 275.

⁶¹ *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967) (athletic director of state university accused of "fixing" football game enough of public figure to only succeed in a libel action if he first proves "actual malice").

⁶² *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Rosenbloom*, a distributor of nudist magazines seeking to charge a radio station with libel for its news reports concerning his involvement in an obscenity arrest was deemed subject to the "actual malice" standard of proof, even though he had been involuntarily caught up in this event of public concern.

⁶³ 384 U.S. 214 (1966).

⁶⁴ *Id.* at 219. The Court was careful to emphasize that free and open political debate was one of the surest methods of guaranteeing such official responsiveness:

[A] major purpose of . . . [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Id. at 218-19.

⁶⁵ 326 U.S. 1 (1945).

⁶⁶ *Id.* at 20. In *Citizen Publ. Co. v. United States*, 394 U.S. 131 (1969), the prohibition of

A comparative consideration of such cases as *Red Lion*, *New York Times*, *Associated Press*, and *Mills* reveals that the public does have a constitutional right to be informed upon the significant issues of the day and that this right is best guaranteed by the raising of a multitude of conflicting political voices.⁶⁷ Financial disclosure laws further the public right to know in several important ways. The substance of the information conveyed by such laws is basic to a citizen's informed participation in the democratic process. Only a public informed of its officials' investment holdings and sources of political financing can exert an inhibitory effect upon potential governmental conflicts of interest.⁶⁸ Furthermore, campaign disclosure laws provide the electorate with an important indication of the philosophy and future official conduct of candidates, for those who control the campaign pursestrings tend to have a continued effect upon elected officials' appointments⁶⁹ and policy positions.⁷⁰ The disclosure of public officials' personal in-

a merger between the only two newspapers in Tucson, Arizona was justified by similar first amendment needs for free competition of ideas and political points of view. In *Williams v. Rhodes*, 393 U.S. 23 (1968), a first amendment case not involving the rights of the press, the Court invalidated an Ohio law making it more difficult for third parties to get on the ballot, resting its decision upon a need to give voters a diverse range of viewpoints from which to pick when making their electoral decisions. *Id.* at 30.

⁶⁷ As Judge Learned Hand said in *United States v. Associated Press*, 52 F. Supp 362, 372 (S.D.N.Y. 1943), the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."

⁶⁸ The knowledge provided the public under both conflict-of-interest and campaign disclosure laws will inhibit favoritism by elected officials toward those with whom they have a financial relationship. Revelation of a public official's financial interests in an annual statement will make him careful to avoid any seeming improprieties in those transactions in which he has a personal interest, for he will realize that the public eye will be particularly intent upon his activities in such areas. A candidate aware of the public's knowledge of his campaign contributors can afford to be no less studiously honest in his post-election dealings with his financial supporters. With election costs skyrocketing, candidates are forced to rely more than ever upon these financial supporters, rather than upon their own financial resources, in their bid for office. Indeed, a recent study of state and national office-holders from Wisconsin not too surprisingly confirmed the fact that individual contributions, rather than a candidate's personal resources, constituted the most significant source of campaign finances. D. ADAMANY, *FINANCING POLITICS* 177 (1969).

⁶⁹ The opportunity for future appointment to office is, in fact, often the motivating force behind campaign contributions. For an illustration of the apparent influence of campaign contributions upon some of President Nixon's recent political appointments, see H. ALEXANDER, *FINANCING THE 1968 ELECTION* 353-55 (1971).

⁷⁰ The possibility of influencing future policy is another important motivation of campaign contributions. F. SORAUF, *PARTY POLITICS IN AMERICA* 321 (1968). Although money may rarely be given to a candidate in return for an understanding that he take certain policy stances in the future, contributions do give donors special access to officials—a favor that can allow special interests to influence officials in more subtle ways. See D.

vestments and political finances thus furthers the first amendment's goal of an informed citizenry as significantly as does the broadcasting of varying political viewpoints mandated by *Red Lion*.

Campaign disclosure laws promote the public right to know in a manner consistent with the emphasis in *Red Lion*, *Associated Press*, and *Mills* upon the need for freewheeling public debate, for they open the electoral process to a wider and more diverse group of participants. Although effectively written disclosure laws may cause political parties to fear the drying-up of funds from wealthy publicity-shy donors,⁷¹ such fears may, in turn, encourage political parties to seek out smaller contributors who, under most statutes, will be exempt from disclosure requirements.⁷² At the same time, such disclosure laws may independently convince larger groups of small contributors to participate in campaigns because such laws provide donors with reasonable assurances that their money will be needed, appreciated, and put to good use by a particular candidate.⁷³ With this broader participation in campaign financing, candidates might not be so dependent upon wealthy contributors. As a consequence, citizens who would have had difficulty appealing to the political sympathies of men of wealth will find it easier to enter politics;⁷⁴ candidates will also be freer to speak their minds

TRUMAN, *THE GOVERNMENTAL PROCESS* 264 (1951). As Senator McClellan (D. Ark.) described the process before a congressional investigating committee in 1957:

I don't think anybody that gave me a contribution ever felt he was buying my vote or anything like that, but he certainly felt he had an entree to me to discuss things with me and I was under obligation at least to give him an audience when he desired it

Quoted in V. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 516 (1964).

⁷¹ See note 87 and accompanying text *infra*.

⁷² Those who contribute under certain minimum amounts are exempted from disclosure requirements under federal and state campaign laws. Under both the Federal Election Campaign Act and the laws of Michigan, for example, contributions less than \$100 are exempted from disclosure. See MICH. STAT. ANN. § 6.1906 (1972).

There are indications that if candidates and political parties made a sustained effort to gain such support from the "little man" not subject to disclosure requirements, they might be quite successful. In 1964, 70% of Barry Goldwater's campaign funds came from contributions of less than \$500, and in 1968, George Wallace received what may be termed "modest" contributions from some 750,000 people. TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS, *supra* note 11, at 46. George McGovern's 1972 campaign was no less successful in recruiting the campaign contribution of the "little man." Cf. NEWSWEEK, Nov. 6, 1972, at 44.

⁷³ It has been said that people would be more willing to contribute to campaigns if they could be reasonably sure that their money was really needed and would be put to good use by a candidate. See TWENTIETH CENTURY FUND, *ELECTING CONGRESS* 15 (1970). Disclosure laws would reveal to potential donors just such information.

⁷⁴ High campaign costs presently discourage office seekers who have no great personal wealth or who hold political philosophies which are: (1) unappealing to those with the big

without worrying about the effects of their views upon a few crucial financial supporters.⁷⁵ The broader political involvement of campaign contributors, freer candidate access to the political arena, and more candid political discussion furthered by campaign disclosure laws will help to guarantee that open conflict of ideas which has been recognized as a necessary concomitant of the public right to know.⁷⁶

Indeed, in the few constitutional cases directly in point, the courts have generally upheld campaign disclosure laws on the basis of their promotion of an informed public capable of deterring misconduct by candidates or government officials. In *United States v. United States Brewers' Association*,⁷⁷ a Pennsylvania federal district court upheld the constitutionality of the Federal Corrupt Practices Act.⁷⁸ The court found that the Act was based on the principle that "an election is intended to be the free and untrammelled choice of the electors."⁷⁹ It then declared that this principle was constitutionally secured by public revelations of any financial influences "corrupting the elector (or) debauching the election."⁸⁰ The same need to insure a citizenry vigilant against the corruption of public servants lay behind the Supreme Court's upholding of an indictment against a treasurer of a campaign committee for not filing a record of expenses required by the Corrupt Practices Act.⁸¹ The Court pointed to the congressional determination that public disclosure of campaign finances would help reduce official corruption⁸² and added that "the verity of this conclusion reasonably cannot be denied."⁸³

Despite such decisions recognizing the support lent by campaign disclosure laws to the public right to know, some commentators continue to assert that these laws are invalid because they somehow infringe that same public right. These commentators

money, or (2) too similar to already-declared candidates who have "dried up" the available money in a particular area of the political spectrum. See D. DUNN, FINANCING PRESIDENTIAL CAMPAIGNS 11-14 (1972).

⁷⁵ Today the need for candidates to rely on a few wealthy contributors inevitably acts as some inhibition upon their candidness on topics of special sensitivity to such contributors. See *id.* at 13-14.

⁷⁶ See note 66 and accompanying text *supra*.

⁷⁷ 239 F. 163 (W.D. Pa. 1916).

⁷⁸ 2 U.S.C. §§ 241-56 (1970).

⁷⁹ 239 F. at 168.

⁸⁰ *Id.* at 168-69.

⁸¹ *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934).

⁸² *Id.* at 548.

⁸³ *Id.* at 547.

emphasize that campaign disclosure laws may inhibit publicity-shy individuals from contributing to political campaigns;⁸⁴ the resulting decrease in funds available to candidates will, they fear, decrease candidates' access to the media, thereby lessening the amount of disseminated campaign information and consequently infringing the public right to know.⁸⁵

Inherent in such an analysis is a mistaken view of the public right to know and an exaggeration of the effect of disclosure laws upon campaign contributors. Although fears of disclosure may frighten off some wealthy campaign contributors, others may be insulated by their wealth and power from any fear of reprisals for their support of a particular candidate.⁸⁶ Indeed, the actual or perceived threat of reprisals for merely contributing to a campaign can be easily over-stated; mere financial support of a candidate may not be regarded by the candidate's "enemies" as a clear indication that the contributor necessarily supports a particular policy position and is therefore worthy of censure.⁸⁷

However, the benignity of campaign disclosure laws' effects upon wealthy contributors can also be overstated. The possibility always remains that individuals will be deterred from contributing to such unpopular causes as, say, the Socialist or American Nazi Parties, for fear that their support for such causes will be trumpeted to the world. But despite this possibility, campaign disclosure laws remain promotive of, not at odds with, the public right to

⁸⁴ The argument is that contributors will be deterred from providing financial aid to unpopular causes because they will fear reprisals from those opposed to such causes. Such deterrence is said to violate contributors' rights to freely associate for the advancement of their political beliefs. See generally Redish 930-32.

⁸⁵ See, e.g., PENNIMAN & WINTER 60; Redish 911. Redish particularly emphasizes the infringement of the public right to know that he believes will result from the inhibitory effects of campaign expenditure ceilings and disclosure laws upon the total amount of information available to a voter during a campaign. See Redish 907-15, 924-32.

⁸⁶ It is, for example, difficult to imagine Howard Hughes or John Paul Getty—two significant contributors to the 1972 Nixon campaign—(see N.Y. Times, Sept. 29, 1973, § 1, at 15, col. 3) being deterred from political involvement out of a fear that economic or social reprisals might be levied against them.

⁸⁷ Although a candidate's financial supporters are some indication of his political beliefs, persons contribute to campaigns for reasons other than their ideological commitment to a candidate. They may wish to obtain a future political appointment, to fulfill a civic duty, to feel the excitement of vicarious participation in a campaign, or merely to enjoy the social advantage of being known as a politician's friend. See D. DUNN, *supra* note 74, at 16-18. Those who might feel antagonistic toward the views of a candidate would probably not be tempted to seek revenge against such donors, especially when contributions have already been made, a campaign has run its course, and the election or defeat of the disliked candidate is a *fait accompli*.

know. Any deterrence of political activity by wealthy campaign backers could be compensated for by candidates who seek out smaller contributors who can remain anonymous under the disclosure laws.

Even if disclosure laws reduced the amount spent in campaigns,⁸⁸ the public right to know would not be substantially impaired. Indeed, it might well be furthered. With reductions in total campaign spending, the repetitious (and expensive) television spot might be replaced by more informative public affairs programs on candidates and issues;⁸⁹ the financial competition between candidates might become more equal;⁹⁰ and the clash of opinion might become more the arbiter of electoral decisions than the jingle of money.⁹¹

⁸⁸ There are reasons to believe that such reductions might well occur. Disclosure laws reveal which candidates have an over-abundance of financial resources and which candidates are in real need of contributions. They thus encourage individuals to give to more poorly financed candidates, where their money will be better appreciated and will have a greater effect. The result should be more constructive debate between candidates in more equal financial positions.

In an even more direct way disclosure laws can reduce the maximum amounts spent in political campaigns. Many state laws (*see note 27 supra*), as well as Title I of the Federal Election Campaign Act (*see note 18 supra*), establish campaign expenditure ceilings. The effectiveness with which such ceilings can be enforced will depend upon the extent to which campaign expenditures and receipts are revealed by disclosure laws.

⁸⁹ Most television [campaign] advertising money . . . is spent on thirty-second and sixty-second "spots," which contribute nothing to the clarification of issues and insult the voter by trying to brainwash his subconscious mind. The objective should be to cut back drastically on this debasing expenditure. N.Y. Times, April 16, 1971, § 1 at 36, col. 1. For a vivid description of how much image-making and how little issue-explaining went into the television commercials of the 1968 campaign, see J. MCGINNIS, *THE SELLING OF THE PRESIDENT 1968*, at 9-25 (1969).

The effectiveness of such commercials after a certain "saturation point" is, indeed, questionable. A study of English television viewers, for example, has revealed that those who viewed ten or more "party election broadcasts" gained less knowledge of issues than voters who viewed between four and nine such broadcasts. J. BLUMLER & D. MCQUAIL, *TELEVISION IN POLITICS 161-62* (1969).

Any switch by less fully financed candidates from such expensive television spots to cheaper participation on special debate programs or news and public interest broadcasts would promote the public right to know assuming that the public would choose to watch such programs. It has, in fact, been shown that such programs contribute more to the voters' knowledge of the candidates and attract wider and more attentive audiences. *See D. DUNN, supra note 72, at 95-98; TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS, supra note 11, at 2* (1969).

⁹⁰ *See note 88 supra.*

⁹¹ When money is so influential in a campaign that its presence allows some candidates to bombard the voter with repetitious political messages and its absence prevents other candidates from fully communicating with the public, then the first amendment's goal of a free marketplace of ideas is not being achieved. *See Rosenthal, Campaign Financing and the Constitution, 9 HARV. J. LEGIS. 359, 374* (1972).

V

A DISCLOSURE STATUTE THAT WOULD OVERCOME
CONSTITUTIONAL OBJECTIONS

Although disclosure statutes promote the public's implicit first amendment right to receive information on points of political interest, they may be open to constitutional attack on grounds that they infringe certain individual first amendment rights of privacy, association, and free expression.⁹² Under a balancing test, financial disclosure laws carefully drafted to effectively promote the public right to know without sweeping too broadly into areas of individual privacy should withstand constitutional challenge.⁹³

The Federal Election Campaign Act⁹⁴ and several of the more comprehensive state campaign disclosure⁹⁵ and conflict-of-interest statutes⁹⁶ appear to meet this constitutional test, for they go only as far as necessary to guarantee public knowledge of the relevant aspects of officials' financial backgrounds. The state conflict-of-interest statutes that require annual public statements of all of an official's investments above a certain minimum amount should allow sufficient public watchfulness over potential official impropriety.⁹⁷ The federal and state campaign laws that force revelations of all receipts and expenditures connected in any way with a political campaign, disclosure of the names and addresses of only significant contributors,⁹⁸ wide public reporting of financial

⁹² See note 37 *supra*; notes 130-31 & 148 *infra*.

⁹³ See note 97 and accompanying text *infra*.

⁹⁴ 2 U.S.C.A. §§ 431-54 (Supp. 1973).

⁹⁵ See note 27 *supra*.

⁹⁶ See note 34 *supra*.

⁹⁷ Certain small investments of an official probably need not be revealed because of the unlikelihood of any real conflicts of interest. However, officials should be forced to reveal *all* their investments in businesses subject to state regulation. It is difficult for an official to decide ahead of time just what businesses will come within the purview of his agency. Also, disclosure laws covering only businesses directly affected by an official's department of government would give such officials too much leeway in deciding which investments to include or exclude from their financial reports. See *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972).

⁹⁸ The Federal Election Campaign Act requires only the disclosure of the names and addresses of those who contribute more than \$100 to a congressional or presidential campaign. 2 U.S.C.A. § 434 (Supp. 1973). Such a requirement would adequately inform the public concerning significant campaign contributors, and at the same time maintain the anonymity of the "little man"—the contributor whose first amendment freedoms may be most easily susceptible to infringement by disclosure laws and upon whom political parties may have to rely most strongly for financial support. Disclosure requirements drawn as carefully as those of the Federal Election Campaign Act thus encroach no further upon an individual's constitutional rights than is justified by the need to guarantee the public right to know.

statements before and after primary and general elections, and strict punishments for reporting violations will effectively promote the public right to know.⁹⁹ Such statutes guarantee that financial information will be received by a candidate's or official's constituency at a time and in a manner consistent with broad public review of official activity. At the same time such statutes compel only the revelation of a candidate's or public official's larger investments and campaign contributors, saving from public scrutiny any personal financial information that would not be of great aid in deterring official conflicts of interest or undesirable campaign tactics.

VI

FINANCIAL DISCLOSURE LAWS AND AN OFFICIAL'S RIGHT OF PRIVACY

A financial disclosure law fashioned specifically and effectively would represent no unwarranted intrusion upon an official's right of privacy.¹⁰⁰ Although *Griswold v. Connecticut*¹⁰¹ is the case most often cited as the modern sire of the right of privacy, the decision recognized that this right has its limits. Legitimate government interests can justify intrusions into an individual's sphere of privacy,¹⁰² and some aspects of an individual's life are so colored with a public character that the right of privacy has no application.¹⁰³ In the case of financial disclosure laws, the public right to know comprises the legitimate government interest that allows some invasion of the right of privacy.¹⁰⁴ Even more significantly, the public nature of the investment and campaign contribution information required by disclosure laws precludes a too zealous guarding of officials' rights of privacy. Such officials have voluntarily entered the public domain, where sound democratic policy requires the baring of their backgrounds, financial and otherwise, to the constituencies they serve.¹⁰⁵

⁹⁹ See notes 10-14 *supra*. Several commentators and election-finance study groups have proposed model campaign disclosure statutes following just such outlines. See PENNIMAN & WINTER 63; RESEARCH & POLICY COMM. OF THE COMM. FOR ECONOMIC DEVELOPMENT, FINANCING A BETTER ELECTION 55-65 (1968).

¹⁰⁰ See notes 101-09 and accompanying text *infra*.

¹⁰¹ 381 U.S. 479 (1965).

¹⁰² See, e.g., *Lopez v. United States*, 373 U.S. 427 (1963). In *Lopez*, a legitimate government interest in the suppression of crime allowed an invasion of an individual's right of privacy through the use of a wiretap.

¹⁰³ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971).

¹⁰⁴ See *Pichler v. Jennings*, 347 F. Supp. 1061, 1068 (S.D.N.Y. 1972).

¹⁰⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The example of Judge Clement Haynsworth's nomination to the Supreme Court and

VII

CAMPAIGN DISCLOSURE LAWS AND A CANDIDATE'S FIRST
AMENDMENT RIGHTS¹⁰⁶

Guaranteeing a candidate's freedom to enter the public arena to speak freely on the issues of the day is an important means of maintaining an informed and politically active citizenry.¹⁰⁷ It is thus important that in attempting to further the public right to know, campaign disclosure laws do not actually hinder that right by inhibiting a candidate's free expression.

Because of their importance in our constitutional system, first amendment freedoms of expression have been jealously guarded from governmental interference.¹⁰⁸ The Supreme Court has, however, recognized certain restricted situations where indirect regulations of free expression can be countenanced. Regulations of conduct amounting to more than pure speech,¹⁰⁹ sanctions only incidentally affecting free expression,¹¹⁰ and indirect regulations of speech justified by a strong governmental interest¹¹¹ have all been upheld as constitutional.

subsequent rejection by the Senate illustrates the importance attached in our government today to the full disclosure of even an appointed official's personal financial background. Contributing to the Senate's growing disenchantment with Haynsworth in the fall of 1969 was the fact that the judge had sat on cases involving corporations in which he had a financial interest, and some thought that Haynsworth had hoped to conceal his potential conflicts of interest until well after his nomination had been confirmed. *See* N.Y. Times, Nov. 22, 1969, § 1, at 20, col. 1.

¹⁰⁶ It might appear that conflict-of-interest statutes would also pose a threat to an official's rights of free expression and association by causing him to fear reprisals from his superiors for his contributions to unpopular causes. Such statutes, however, usually only force disclosure of financial investments, rather than political contributions. *See, e.g.,* OKLA. STAT. ANN. tit. 74, §§ 1401-16 (Supp. 1972). The chances of one's *investments* displeasing his superiors in a way that would invite retaliation for the espousing of particular *political* viewpoints are quite slim. Campaign disclosure laws thus carry a greater potential for infringements of rights of free expression and association than do conflict-of-interest laws. For that reason, campaign disclosure laws will be treated exclusively in this and in the following section; it should be remembered, however, that the following arguments favoring the constitutionality of campaign disclosure laws often apply with even greater, and perhaps conclusive, weight to conflict-of-interest laws.

¹⁰⁷ *Cf.* Bond v. Floyd, 385 U.S. 116 (1966).

¹⁰⁸ For example, in NAACP v. Button, 371 U.S. 415 (1962), the Court said: These [first amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Id. at 433.

¹⁰⁹ *See* Thomas v. Collins, 323 U.S. 516 (1945).

¹¹⁰ *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

¹¹¹ *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 96-97 (1961).

In concurring, Justice Douglas stated:

Campaign disclosure laws should be upheld as regulations of activity exceeding mere expression—regulations which, moreover, only incidentally affect free expression and are supported by an overwhelming public interest.¹¹² Several court decisions have acknowledged that the marshalling of campaign finances is conduct amounting to more than pure speech.¹¹³ Moreover, any incidental infringements of free expression resulting from the regulation of such conduct will be minimal.¹¹⁴ Fear of the revelation of campaign contributors should not frighten off men who today enter public life already aware of the strong glare of publicity that exists in that arena.¹¹⁵ Any adverse effect upon a candidate's finances that may result from campaign regulations¹¹⁶ would not significantly prejudice his ability to communicate with the public.¹¹⁷ Indeed, the

Though the activities themselves are under the First Amendment, the manner of their exercise or their collateral aspects fall without it.

Like reasons underlie our decisions which sustain laws that require various groups to register before engaging in specified activities. Thus . . . criminal sanctions for failure to report and to disclose all contributions made to political parties are permitted.

Id. at 173-74.

¹¹² In *United States v. O'Brien*, 391 U.S. 367 (1968), a federal statute making draft-card burning a crime was upheld under a similar rationale:

[A] government regulation is sufficiently justified if it . . . furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

¹¹³ In *Thomas v. Collins*, 323 U.S. 516 (1945), for example, the Court emphasized that any infringements of "pure speech" can only be justified by real public danger, but then added:

Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed.

Id. at 540 (emphasis added).

¹¹⁴ Indeed, the infringement of the conduct itself—*i.e.* the contributing of campaign funds—may not be great. Although some large contributors may be deterred from their political activity by a fear of reprisals, the manner in which the public mind distinguishes financial from ideological support in political campaigns indicates that a fear of such effects may be exaggerated. See note 87 *supra*. Furthermore, many contributors will never be deterred from their political activities because their contributions are simply not covered by disclosure statutes. See note 72 *supra*.

¹¹⁵ Cf. *United States v. Costello*, 255 F.2d 876, 883-84 (2d Cir. 1958) (use of federal income tax returns by government to obtain information concerning prospective jurors not improper; knowledge of such scrutiny will not deter jurors from serving any more than "fierce publicity" deters citizens from seeking high offices of government); V. PACKARD, *THE NAKED SOCIETY* 103-15 (1964).

¹¹⁶ There is no real proof that such an adverse effect would actually occur. See notes 141-43 and accompanying text *infra*.

¹¹⁷ A candidate has no right to monopolize the airwaves to communicate his point of view (see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1968)), and he can make up for any need to economize on his television advertising by a more extensive

possible decrease in the influence of money as an electoral arbiter might well allow candidates to exercise their freedom of expression¹¹⁸ in a fuller and possibly more effective manner.

In several recent decisions, regulatory statutes that incidentally affect speech-related conduct have been upheld on the basis of the legitimate state interest which they further.¹¹⁹ Government interests in guarding against political subversion have justified legislative investigations into an individual's associational background;¹²⁰ the public need for information concerning criminal activities has allowed the disclosure of a reporter's confidential sources to be compelled;¹²¹ and the need for the public to be informed about the backgrounds of its leaders has supported the forced revelation of teachers' and lawyers' organizational ties,¹²² of newspapers' financial supporters,¹²³ and of lobbyists' political benefactors.¹²⁴ Laws forcing similar disclosures of candidates' financial backgrounds should be upheld as no less significant to the public welfare and no more restrictive of rights of free expression.

Most seriously calling into question the legitimacy of campaign disclosure laws relative to the first amendment is the case of *Shelton v. Tucker*.¹²⁵ In *Shelton*, the Supreme Court struck down a law requiring teachers to reveal all the organizations to which they had belonged or contributed during a five-year period. Such a requirement, the Court felt, would infringe upon teachers' rights of free expression and association by making them fear possible

use of more informative means of communicating with the voters, such as leaflets, newspaper articles, and news or public affairs programs.

¹¹⁸ See notes 72-76 and accompanying text *supra*.

¹¹⁹ See notes 120-24 and accompanying text *infra*.

¹²⁰ See *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961). *But see* *Sweezy v. New Hampshire*, 354 U.S. 234 (1956) (governmental authority to investigate citizens went beyond what was necessary to protect society from subversion); *Watkins v. United States*, 354 U.S. 178 (1956) (legitimate government interest must support legislative investigations).

¹²¹ See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹²² See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Adler v. Board of Educ.*, 342 U.S. 485 (1952). In *Konigsberg* the Court stated: [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law that the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interests involved.

366 U.S. at 50-51. *But see In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar*, 401 U.S. 1 (1971). In both *Baird* and *Stolar*, the balancing test was construed to favor individual rights over governmental interests.

¹²³ See *Lewis Publ. Co. v. Morgan*, 229 U.S. 288 (1913).

¹²⁴ See *United States v. Harriss*, 347 U.S. 612 (1954).

¹²⁵ 364 U.S. 479 (1960).

reprisals from the public or from their employers for their unpopular beliefs.¹²⁶ At first glance, disclosure laws might appear subject to the analogous criticism that they infringe candidates' rights of free expression and association by causing them to fear reprisals for their revealed relationships with unpopular persons and causes.

However, important distinctions exist between campaign disclosure laws and the statute invalidated in *Shelton*. In *Shelton*, all organizational ties had to be revealed, regardless of whether they presumptively affected a teacher's classroom conduct.¹²⁷ Campaign disclosure laws, on the other hand, compel only the publicity of contributions that provide important voter information.¹²⁸ Such laws are designed to guarantee the public's right to be informed about its leaders rather than to make possible a peremptory discharge of officials not of "correct character."¹²⁹ Moreover, there is a significant difference between the propriety of disclosing the financial backgrounds of candidates who have voluntarily entered public life, and forcing revelation of the associational ties of teachers, who have remained in private occupations peculiarly dependent upon freedom from the fear of politically induced reprisals.¹³⁰ Disclosure laws thus further a stronger governmental interest in a less inhibitory way than do statutes of the kind invalidated in *Shelton*. As regulations of "speech plus" adapted specifically to meet their legitimate ends,¹³¹ financial disclosure laws should not be invalidated as undue abridgements of candidates' rights of free expression or association.

VIII

CAMPAIGN DISCLOSURE LAWS AND CONTRIBUTORS' FIRST AMENDMENT RIGHTS

Some courts and commentators have expressed fears that even if campaign disclosure laws do not infringe a candidate's first

¹²⁶ *Id.* at 486-87, 490.

¹²⁷ The Court emphasized in *Shelton* that such a broad-ranging statute was particularly inappropriate in the give-and-take of the classroom, and added:

The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.

Id. at 490.

¹²⁸ See notes 94-98 and accompanying text *supra*.

¹²⁹ In *Shelton*, the Court emphasized that the unconstitutional statute required teachers to reveal their organizational ties to their employers, who might justify subsequent discharges on the basis of such disclosures. 364 U.S. at 486-87. The threat of significant reprisals was thus much weightier in the *Shelton* case than in the case of disclosure statutes.

¹³⁰ See *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960).

¹³¹ See notes 112-18 and accompanying text *supra*.

amendment rights, they do inhibit his contributors' rights to freely associate to promote their political views.¹³² Such individuals, the argument goes, might not engage in their particular brand of political activity if they knew that their names and addresses were to be widely publicized. It is feared that instead of risking persecution for any unpopular views they support, such people might decline political involvement completely, thereby doing damage to our system of free expression and robust public debate.¹³³

This fear finds apparent support in several recent Supreme Court decisions involving the right of association. In *NAACP v. Alabama*,¹³⁴ and its companion cases,¹³⁵ the Court disallowed the compelled disclosure of NAACP membership lists. The Court emphasized in these cases that free public debate might be jeopardized when citizens had reason to fear that the wide publicity of their membership in certain political groups might subject them to economic or physical reprisals. The Court thus concluded that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association."¹³⁶

Despite apparent similarities between the compelled revelation of membership lists and the forced disclosure of campaign contributors, several crucial distinctions separate such types of regulations. For example, a greater public interest supports the disclosure of campaign contributors than supports the revelation of NAACP membership lists. Campaign disclosure statutes further an informed public—a goal which not only has been acknowledged as a legitimate state interest¹³⁷ but has been elevated to a constitutional requirement.¹³⁸ For the production of NAACP membership lists, on the other hand, the states involved could show no legitimate governmental needs.¹³⁹

¹³² See, e.g., *Pichler v. Jennings*, 347 F. Supp. 1061, 1069 (S.D.N.Y. 1972); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 634, 645 (1970); Redish 932.

¹³³ See *Pichler v. Jennings*, 347 F. Supp. 1061, 1069 (S.D.N.Y. 1972).

¹³⁴ 357 U.S. 449 (1958).

¹³⁵ *Louisiana v. NAACP*, 366 U.S. 293 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

¹³⁶ 357 U.S. at 462. See also *Talley v. California*, 362 U.S. 60 (1960). Other cases have recognized the need for a person's political affiliations to be kept anonymous without elevating the problem of free association to a constitutional plane. See, e.g., *United States v. Rumely*, 345 U.S. 41 (1953) (congressional committee investigating "lobbying activities" exceeded its power in asking witness for names of all those who made bulk purchases of political books he had been offering for sale).

¹³⁷ See notes 54-63 and accompanying text *supra*.

¹³⁸ See notes 51-53 and accompanying text *supra*.

¹³⁹ The Court found in *NAACP v. Alabama*, 357 U.S. 449 (1958), that the state had shown no "controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466.

Campaign disclosure laws, in contrast to such overly broad and thinly justified regulations, further a strong public interest in a manner involving minimum infringements upon the right of association. The threat of serious economic and physical reprisals, apparent in the *NAACP* cases,¹⁴⁰ will not be felt so strongly by campaign contributors. Provisions of disclosure statutes exempting small contributors from reporting requirements, the slight degree to which the public may scrutinize the activities of modest campaign contributors,¹⁴¹ and the greater ability of large contributors to withstand economic or political threats, all militate against any significant deterrence of campaign contributors' political involvement. The potential for reprisals against campaign contributors is also mitigated by a public awareness that individuals contribute to campaigns for reasons other than ideology and, consequently, that a person's financial support for a candidate does not necessarily indicate political support for every position that a candidate takes.¹⁴²

Under any forced disclosure of campaign finances, the possibility will always exist that publicity-shy contributors will be deterred from political involvement out of fears, however groundless, that they might lose their jobs, offend their friends and business customers, or even suffer physical intimidation on account of their disclosed political preferences. However, the right to associate with others to promote one's political viewpoint is not absolute.¹⁴³ Like a candidate's rights of free expression, a contributor's rights of

¹⁴⁰ In *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), the Court emphasized that the NAACP had made an "uncontroverted showing" that revelation of the identity of its members had exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

In *Talley v. California*, 362 U.S. 60 (1960), the traditional use of handbills as a form of vehement political expression and the great possibility of public disfavor toward the sponsors of such handbills pushed the Court to find the publicity requirement violative of the right of association. *Id.* at 64-65.

¹⁴¹ Indeed, those small contributors whose associational rights are most fragile would appear to be least compromised by campaign disclosure laws:

As a practical matter, the person most likely to be deterred [*sic*] by publicity from contributing—the "little man" who cannot afford to offend his superiors—is least likely to have his contribution publicized. It is hard to conceive of someone going up to the repository of reports to see whether an underling contributed to the "proper" political party, and newspapers are unlikely to list small or medium contributors.

Lobel, *supra* note 18, at 43.

¹⁴² See note 87 and accompanying text *supra*. The indications of ideological support are, however, much clearer in the case of those who join an organization as politically oriented as the NAACP, and in such a situation the threats of reprisal for holding certain political beliefs are correspondingly greater. See note 140 *supra*.

¹⁴³ See *Bryant v. Zimmerman*, 278 U.S. 63 (1928).

association can legitimately suffer slight infringements under the more effectively written campaign disclosure statutes.¹⁴⁴ Such statutes, justified by the public's overriding constitutional right to know, are objective regulations designed to secure their ends with the narrowest possible encroachment upon associational rights. Under sound constitutional precedent, such types of campaign disclosure laws ought to withstand first amendment assaults.¹⁴⁵

IX

FINANCIAL DISCLOSURE LAWS AND THE PROBLEM OF SELF-INCRIMINATION

The fifth amendment's privilege against self-incrimination—a privilege no less anchored in rights of individual privacy than the constitutional freedoms previously discussed¹⁴⁶—may be raised when conflict-of-interest laws threaten to reveal a public official's illegal investments or when campaign disclosure laws threaten to reveal a candidate's violation of an election expenditure ceiling.¹⁴⁷ An analysis of several Supreme Court decisions, however, indicates that disclosure laws do not violate that privilege.

In *United States v. Sullivan*,¹⁴⁸ the Court upheld the criminal conviction of a taxpayer who refused to file an income tax return because of its potentially incriminating revelation of his illegal gains and expenditures. The Court emphasized that most of the information required by the return would not have been incriminating and that, if the taxpayer had filed the return, making known the incriminating questions he refused to answer, the Court could at that time pass upon the appropriateness of his withholdings.¹⁴⁹ In a group of decisions subsequent to *Sullivan*, the Court has exempted persons from other filing and registration requirements when compliance with such requirements involved certain and appreciable hazards of self-incrimination. Relying heavily on an earlier case disallowing disclosure requirements directed at inherently suspect

¹⁴⁴ See notes 16-27 *supra* for a discussion of the best-drawn campaign disclosure statutes, which are probably immune from constitutional challenge.

¹⁴⁵ See notes 101-09 and accompanying text *supra*.

¹⁴⁶ See *Tehan v. Schott*, 382 U.S. 406, 416 (1966).

¹⁴⁷ See note 27 *supra* for a summary of those state campaign disclosure laws providing for criminal penalties for the exceeding of such expenditure ceilings and for certain other "corrupt practices." The Federal Election Campaign Act provides criminal penalties for similar violations. See notes 19-23 and accompanying text *supra*.

¹⁴⁸ 274 U.S. 259 (1927).

¹⁴⁹ *Id.* at 264.

criminal groups,¹⁵⁰ the Court has found registration requirements of the National Firearms Act¹⁵¹ and of the Gambling¹⁵² and Marijuana¹⁵³ Tax Acts violative of the fifth amendment.

The Supreme Court's approach to such registration requirements does not dictate an invalidation of financial disclosure laws upon similar grounds. Disclosure laws are not directed at "a highly selective group inherently suspect of criminal activities";¹⁵⁴ instead, disclosure requirements are asserted in "an essentially non-criminal and regulatory area of inquiry."¹⁵⁵ The hazards of self-incrimination under such statutes are thus significantly less appreciable than under the various registration laws invalidated by the Supreme Court on fifth amendment grounds.¹⁵⁶

Financial disclosure laws are also supported by a governmental interest directly related to the manner of their enforcement. The public right to know can only be supported by compelled disclosure of the financial statements of candidates and public officials. Given the positions of political leadership held by such people, statements of their financial backgrounds ought to be deemed to have taken on sufficient public aspects to warrant even the revelation of "incriminating" evidence. Indeed, such has been the rationale of the Court in allowing forced disclosure of certain potentially incriminating records required to be kept as sources of information for the enforcement of general regulatory statutes.¹⁵⁷ This "required records" doctrine is but one indication of the Court's recent recognition that statutes narrowly drawn to serve appropriate

¹⁵⁰ *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (invalidating, on fifth amendment grounds, statutory requirement that Communist Party register and deposit list of members with Attorney-General).

¹⁵¹ *Haynes v. United States*, 390 U.S. 85 (1968).

¹⁵² *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968).

¹⁵³ *Leary v. United States*, 395 U.S. 6 (1969).

¹⁵⁴ *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965).

¹⁵⁵ *Id.*

¹⁵⁶ In each of those cases, in fact, the act of registration itself provided nearly conclusive proof of the commission of a crime. As the Court said in *Marchetti v. United States*, 390 U.S. 39, 49 (1968): "[E]very portion of these requirements had the direct and unmistakable consequence of incriminating petitioner."

¹⁵⁷ See *Shapiro v. United States*, 335 U.S. 1 (1948). In refuting the petitioner's claim that the compelled production of bookkeeping records under the Emergency Price Control Act violated his fifth amendment privilege, the Court in *Shapiro* added:

[T]here is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.

Id. at 32; see *Davis v. United States*, 328 U.S. 582 (1946).

public needs can justifiably compel certain compromising disclosures without violating an individual's privilege against self-incrimination.¹⁵⁸

Financial disclosure laws can coexist with the fifth amendment's self-incrimination privilege on terms similar to those long ago applied to federal income tax returns in the *Sullivan* case. The statutes themselves, as appropriate regulatory measures applying to all groups rather than merely to criminally suspect ones, should be upheld in their general application. In light of their supporting public interest, such statutes' specific disclosure requirements should also be upheld, even when they require incriminating revelations.¹⁵⁹ Any reluctance by the legislatures to compel such specifically incriminating revelations could, of course, be avoided by inserting immunity provisions into financial disclosure statutes.¹⁶⁰

CONCLUSION

Conflict-of-interest and campaign disclosure laws stand at the boundary between the legitimate power of the state and the inviolable rights of the individual. It is their furtherance of the public right to know that justifies the intrusion of such laws into a citizen's private affairs. But individual rights are precious, too, in our constitutional system, and so only the most narrowly and effectively drawn disclosure statutes should withstand judicial scrutiny.

When only candidates' or public officials' rights of privacy are involved, the need for their protection appears clearly outweighed by the public need to remain informed about its leaders' financial

¹⁵⁸ See *California v. Byers*, 402 U.S. 424 (1971). In upholding a "hit-and-run" statute requiring drivers to stop at the scene of an accident and report their involvement, the Court in *Byers* said: "[T]he mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Id.* at 428.

¹⁵⁹ See notes 157-58 and accompanying text *supra*.

¹⁶⁰ To be deemed constitutional, such immunity provisions would have to provide as much protection as the self-incrimination privilege itself—that is, absolute protection from the direct or indirect use of evidence obtained from disclosures in any prosecutions for crimes occurring prior to, or contemporaneously with, such disclosures. See *United States v. Freed*, 401 U.S. 601 (1971); *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964). In some cases officials could suffer sanctions for refusing to submit disclosure reports, even though their refusal was based upon a legitimate assertion of their privilege against self-incrimination. Such punishment, however, would have to be based upon independent determinations of the officials' misconduct in refusing to comply with statutory requirements. See *Nelson v. County of Los Angeles*, 362 U.S. 1 (1959); *Lerner v. Casey*, 357 U.S. 468 (1958); *Berlan v. Board of Educ.*, 357 U.S. 399 (1958). *But see* *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Slochower v. Board of Educ.*, 350 U.S. 551 (1955).

backgrounds, and to thereby carry out an effective review of their official actions. The compelled revelation of investments by conflict-of-interest statutes and of incriminating contributions by campaign disclosure laws is thus justified. When first amendment rights of free expression and association hang in the balance, however, the constitutional analysis becomes more delicate. Campaign disclosure statutes affecting such rights must be directed not only at effective publicity of a candidate's finances but also at the careful coverage of only those large contributors whose support carries the potential for corruption or helps reveal the nature of a candidate's future performance in office. Campaign disclosure laws drawn in such a manner should be constitutionally sustained. Such laws will not sweep too broadly into first amendment rights. On the contrary, they will sustain the philosophy of the first amendment by promoting a more informed electorate, freer entry into the political arena, and franker discussion of public issues.

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